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IN THE

Supreme Court of the United States

No. 593.

October Term, 1946.

FRANCIS R. COPE, JR.,

Petitioner,

v.

A. M. ANDERSON, Receiver of the National Bank of Kentucky,

Respondent.

BRIEF FOR PETITIONER.

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FRANCIS R. COPE, JR.,

Petitioner,

v.

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY,

Respondent.

BRIEF FOR PETITIONER.

THE DECISIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania on August 3, 1945 entered judgment (R. 49a) granting petitioner's motion to dismiss in accordance with the opinion of the court (R. 43a) filed the same day. The opinion of the District Court is reported in 62 F. Supp. 705 (D. C. Pa., 1945). The opinion of the Circuit Court of Appeals (R. 58a-64a) reversing the judgment of the District Court is reported in 156 F. (2d) 972 (C. C. A. 3rd, 1946).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on August 13, 1946 (R. 65a). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED.

(1) Is the suit barred by the Pennsylvania Act of June 26, 1895, a part of the general limitation law of the forum, which "borrows" the limitation period of the State where the cause of action arose?

(2) Does the limitation law of the forum apply in an action by a receiver of a national bank to enforce the double liability of its shareholders, which liability has its origin in a federal statute?

(3) When the receiver of a national bank, in accordance with an assessment made by the Comptroller of the Currency, directs the shareholders of that bank to pay the assessment to him at his office on or before a specified date, does the cause of action arise and accrue *when* payment is not so made and *where* the shareholder was directed, and had the duty, to make the payment?

SPECIFICATIONS OF ERROR.

1. The Third Circuit Court of Appeals erred in reversing the decision of the District Court.

2. The Third Circuit Court of Appeals erred in holding respondent's cause of action did not arise in Kentucky.

THE STATUTES INVOLVED.

Section 12 of the National Bank Act:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares * * *" (Rev. Stat. § 5151, 12 U. S. C. § 63; derived from Act of June 3, 1864, c. 106, § 12, 13 Stat. 102.)

Section 23 of the Federal Reserve Act:

"The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value

thereof in addition to the amount invested in such stock. * * *" (38 Stat. 273, 12 U. S. C. § 64.)

The Pennsylvania Act of June 26, 1895:

"When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth."

(Act of June 26, 1895, P. L. 375, § 1, 12 Purd. Stat. § 39.)

The Kentucky Statute of Limitations:

"An action upon a contract not in writing, signed by the party, express or implied; an action upon a liability created by statute, when no other time is fixed by the statute creating the liability * * * shall be commenced within five years next after the cause of action accrued." (General Statutes, Chap. 71, Art. III, Sec. 2; Kent. Rev. Stat., Baldwins 1930 Rev., Chap. 80, Sec. 2515.)

The District of Columbia Code (1940 ed.), Section 12-201:

"No action shall be brought * * * upon any simple contract, express or implied * * * after three years from the time when the right to maintain any such action shall have accrued; nor for any statutory penalty or forfeiture * * * after one year from the time when the right to maintain any such action shall have accrued; and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued. * * *" (Act of March 3, 1901, 31 Stat. 1389, Chap. 854, § 1265; Act of June 30, 1902, 32 Stat. 542, Chap. 1329.)

STATEMENT OF FACTS.

Respondent is Receiver of the National Bank of Kentucky ("The Bank") (R. 5a), a national banking association domiciled at Louisville, Jefferson County, in the Western District of Kentucky (R. 4a).

Petitioner is a shareholder of The BancoKentucky Company ("Banco") (R. 21a), a financial corporation organized under the laws of the State of Delaware (R. 12a).

On April 22, 1927, the shareholders of The Bank, together with the shareholders of Louisville Trust Company, transferred their shares of both institutions to six trustees and received for them participation certificates. The trustees were the record owners of all shares of both banks and the participation certificate holders were the real and beneficial owners (R. 8a-9a). In 1929 the holders of participation certificates transferred their certificates to Banco in exchange for Banco shares.

On November 17, 1930 the Comptroller of the Currency appointed a receiver of The Bank and on February 20, 1931, levied 100% assessment against its shareholders (R. 4a, 17a). In March, 1931, the Receiver, "acting pursuant to the authority and direction of the Comptroller of the Currency," notified Banco shareholders that demand had been made upon Banco for the payment of the assessment and that if he did not succeed in collecting from Banco he intended to proceed against the said Banco shareholders (R. 17a). The notice stated in part:

> "As a stockholder in the BancoKentucky Company, you will please take notice, that the *Comptroller of the Currency has* on February 20, 1931, *levied an assessment* upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, *payable at the Office of the Receiver* (Louisville, Kentucky) on or before April 1, 1931." (Parenthesis and italics added.)

In October, 1931, the Receiver of The Bank sued Banco for the assessment as the holder of substantially all of The Bank's shares (R. 18a) and obtained a judgment which was affirmed on appeal: *Laurent v. Anderson,* 70 F. (2d) 819 (C. C. A. 6th, 1934). $90,745.17 was paid on that judgment (R. 19a).

On February 17, 1936, A. M. Anderson, substituted receiver of The Bank, started an action in the United States District Court for the Western District of Kentucky against certain stockholders of Banco: *Anderson v. Abbott, et al.,* 32 F. Supp. 328 (D. C. Ky., 1940). On March 23, 1940, the District Court handed down an opinion dismissing the action. The United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court: *Anderson v. Abbott, et al.,* 127 F. (2d) 696 (C. C. A. 6th, 1942).

This Court in a five to four decision on March 6, 1944, reversed the two courts below: *Anderson v. Abbott, et al.,* 321 U. S. 349 (1944).

A. M. Anderson, Receiver of The Bank, began the Pennsylvania phase of this litigation by filing suit against petitioner and other stockholders of Banco in the District Court of the United States for the Eastern District of Pennsylvania on February 18, 1937 (R. 1a), five years and 323 days after the cause of action arose. Petitioner filed a motion to dismiss on the ground, inter alia, that the action was barred under the Pennsylvania "borrowing" statute of limitations (Act of June 26, 1895) (R. 42a). Further proceedings were postponed pending the outcome of the proceedings instituted in the District Court of the United States for the Western District of Kentucky in the case of *Anderson v. Abbott, et al.* (outlined *supra*). The District Court for the Eastern District of Pennsylvania in an opinion by District Judge Bard, filed August 3, 1945, held that the action was barred and dismissed the complaint (R. 43a-49a). On October 3, 1945, the receiver filed his appeal in the Circuit Court of Appeals for the Third Circuit. On

August 13, 1946, the said Circuit Court of Appeals reversed the judgment of the District Court. On December 9, 1946 the Petition for Writ of Certiorari filed by Francis R. Cope, Jr. (with the understanding that the decision as to the statute of limitation would be binding on all parties in the court below) was granted by this Court.

ARGUMENT.

A. The Applicable Statute of Limitations Is the Pennsylvania Act of 1895 Which Borrows the Kentucky Statute.

Statutes of limitation are procedural in nature and the policy expressed by such statutes prohibits the maintenance of an action in the courts of the forum after the lapse of the prescribed period. In any discussion of conflict of laws it is axiomatic that the law of the forum governs so far as the limitation of actions is concerned: *Rawlings v. Ray*, 312 U. S. 96 (1941); *Pufahl v. Parks*, 299 U. S. 217 (1936); *McClaine v. Rankin*, 197 U. S. 154 (1905); *Platt v. Wilmot*, 193 U. S. 602 (1904).

The forum in the instant proceeding is the State of Pennsylvania. The Pennsylvania limitation law contains the following statutory provision:

> "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this Commonwealth." [Act of June 26, 1895, P. L. 375 § 1 (12 P. S. § 39)].

This type of statute which adopts as its own period of limitation the period of limitation of the place where the cause of action arose is generally referred to as a "borrowing" statute. Statutes of this nature have been adopted in most of the States in the Union. In Pennsylvania, as in other States which have enacted such statutes, the "borrowing" statute is a part of the general limitation law and in the instant proceeding it is the applicable limitation law of the forum. The Act of June 26, 1895, *supra*, is applied by the courts of Pennsylvania when the cause of action arose outside of the state: *Mister v. Burkholder*, 56 Pa. Super. 517 (1914); *Fletcher's Estate*, 45 D. & C. 673 (1942).

The constitutionality of "borrowing" statutes has been upheld by this Court in the case of *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553 (1920).

When, as in the case at bar, equity jurisdiction is concurrent with that at law and the suit is brought in aid of a legal right, the Federal Courts apply the applicable state statute of limitations.

> "Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations." *Russell v. Todd*, 309 U. S. 280, 289 (1940).

> "Where the suit is brought in equity and is not in aid or support of a legal right, the jurisdiction on the equity side is said to be 'exclusive' and the limitation period applicable is determined by the doctrine of laches as applied in federal courts, assuming that there is no local statute applicable to suits in equity. Where, however, the jurisdiction of equity is 'concurrent' with that at law or the suit is brought in aid of a legal right, the state statute of limitations applicable to legal remedies and rights will be applied in the equity suit." *Overfield, et al. v. The Pennroad Corporation, et al.*, 146 F. (2d) 889, 892 (C. C. A. 3rd, 1944), Goodrich, C. J.

In the present proceeding the District Court quite properly applied the general limitation law of Pennsylvania (the forum). District Judge Bard said in his opinion:

> "Since the cause of action has been fully barred by the limitation laws of Kentucky, the state in which it arose, the Pennsylvania 'borrowing' statute makes the Kentucky statute of limitations operative as the applicable limitation law of the forum.

"The Pennsylvania Act of June 26, 1895, borrows the Kentucky limitation statute which becomes the limitation law of the forum for the purposes of this case, and requires that plaintiff's remedial rights against defendants be controlled by the five year limitation period of Kentucky." *Anderson v. Andrews*, 62 F. Supp. 705 at 708-9, (D. C. Pa., 1945).

B. The Kentucky Statute of Limitations Borrowed by the Pennsylvania Act of June 26, 1895.

The applicable statute of limitations of the State of Kentucky provides:

> "An action upon a contract not in writing, signed by the party, expressed or implied; an action upon a liability created by statute, when no other time is fixed by the statute creating the liability . . . shall be commenced within five years next after the cause of action accrued." (General Statutes, Chap. 71, Art. III, Sec. 2; Kentucky Revised Statutes, Baldwin's 1930 Revision, Chap. 80, Sec. 2515.)

The Kentucky statute of limitations applies to all actions at law and in equity. Suit against the shareholders of Banco had to be commenced within five years. The last day was March 31, 1936. The Receiver exercised care in this regard with respect to shareholders of Banco living in Kentucky and instituted suit against those shareholders on February 19, 1936.

In the action against Banco shareholders living in Kentucky [*A. M. Anderson, Receiver of National Bank of Kentucky v. Davis J. Abbott, et al.*, United States District Court, Western District of Kentucky, Louisville, No. 1046] the case came before District Judge Swinford on motions presenting the sufficiency of the complaint and the legality of the defense of the statute of limitations [*Anderson v. Abbott et al.*, 23 F. Supp. 265 (D. C. Ky., 1938)]. With respect to the statute of limitations counsel for the Receiver

took the position that the action was commenced within the five year period and that it made no difference whether the cause of action accrued on the date the assessment was levied (February 20, 1931) or the date it was payable (April 1, 1931) because the action was instituted within five years of each of these dates. In his opinion dated May 13, 1938, Judge Swinford sustained the position of the Receiver, saying:

> "The Statute of Limitations is not a defense. The Kentucky Statute, Section 2515, provides certain character of actions that must be brought within five years. . . .
>
> "An action against the shareholders for an assessment does not accrue until the assessment is due and payable. The assessment was levied on February 20, 1931, and payable on April 1, 1931. This proceeding was instituted on February 19, 1936. It was April 1, 1931, that the right of action accrued" (p. 268).

In the case of *The Auditor v. Halbert*, 78 Ky. 577 (1880) the court held that the statute of limitations (quoted above) applied to cases in equity (p. 578):

> "The word 'action' as used in the statute of limitations is not restricted in its signification to that which is technically an action, but includes all civil proceedings in courts of justice for the enforcement of legal or equitable rights, whether by action, suit, or special proceedings."

Again, in the case of *Hargis v. Sewell's Administrator*, 87 Ky. 63 (1888), the court said (p. 67):

> ". . . The statute of limitations applies to all actions, whether at law or in equity, and the chancellor can exercise no discretion on the subject, but must apply the statute when properly pleaded, although the jurisdiction over the subject matter belongs exclusively to a court of equity."

It is clear that under the law of the State of Kentucky any action against the shareholders of Banco to recover the statutory double liability had to be instituted before April 1, 1936. It is equally clear that the present action against the shareholders of Banco to recover the statutory double liability was commenced on February 18, 1937 (over ten months after April 1, 1936) and would have been barred by the law of Kentucky where it arose. By virtue of the Pennsylvania Act of June 26, 1895 which applies the Kentucky five year statute in the instant situation, the present action is barred by the law of Pennsylvania.

The Kentucky cases cited above set forth the rule that the Kentucky statute of limitations bars all actions—whether they be equitable or legal. The Pennsylvania Act of June 26, 1895 applies to all causes of action which have been fully barred by the laws of the state in which they arose. Therefore, the present action would be barred by the law of Pennsylvania even if equity were the exclusive remedy.

C. The "Cause of Action"—When It Arose.

The possibility of statutory double liability as a holder of stock of a national bank first comes into existence upon the acquisition of the national bank stock. *Liability* arises when the bank is found to be insolvent and the Comptroller makes an assessment which must be paid to the Receiver on or before a date fixed by the Comptroller. The *cause of action* arises when the shareholder fails to pay the assessment to the Receiver at the time and place fixed for payment.

The statutory provision does not in and of itself create a cause of action. A cause of action does not arise until a prohibited act is committed or until there is a failure to perform a required act. The failure of duty which gives rise to a cause of action against a shareholder of a national bank is the failure to pay the assessment to the Receiver on the date and at the placed fixed for payment.

The "order" of the Comptroller does not in and of itself create a cause of action: *Rawlings v. Ray, supra; Pufahl v. Parks, supra.* The Receiver cannot sue until the shareholder fails to pay the assessment at the time and place designated. The decisions of this Court have established beyond question that the statute of limitations does not begin to run until the liability ripens into a cause of action upon failure to make payment to the Receiver as directed by him.

If the contention of the Receiver—that the "order" of the Comptroller creates a cause of action—were correct, then the statute of limitations would begin to run *when* the Comptroller issued his "order". Such is not the case:

> "In *Rawlings v. Ray*, 312 U. S. 96, we decided that state statutes of limitations govern the time within which to enforce the liability imposed upon stockholders of insolvent national banks by assessments levied by the Comptroller of the Currency • • • and, that suit cannot be instituted prior to the date fixed for payment and a state statute of limitations does not begin to run until that date." *Fisher v. Whiton*, 317 U. S. 217, at 218 (1942).

The order of the Comptroller applies with equal force to all shareholders, but the Receiver does not have a cause of action against all shareholders. The Receiver only has a cause of action against shareholders who do not pay the assessment to him on or before the date fixed by the Comptroller in his order.

The alleged cause of action here arose *when* the defendants failed to pay the assessment to the Receiver at his office on or before April 1, 1931:

> "An action against the shareholders for an assessment does not accrue until the assessment is due and payable. The assessment was levied on February 20, 1931, and payable on April 1, 1931. This proceeding was instituted on February 19, 1936. It *was April 1, 1931,*

that the right of action accrued.'' Anderson v. Abbott et al., 23 F. Supp. 265, 268 (D. C. Ky., 1938) (Italics added).

D. The "Cause of Action"—Where It Arose.

Recent decisions of this Court are all to the effect that a cause of action does not arise until a shareholder fails to pay the assessment to the Receiver by the date fixed by the Comptroller. It is submitted that this failure to pay the Receiver also determines where the cause of action arose. This thought is well expressed in the following language taken from the opinion of Cleasby, one of the Judges of the Court of Eschequer in *Durham v. Spence*, the Law Reports Exchequer Cases, Vol. 6, 1870-71, p. 52:

> "Now the cause of action must have reference to some time as well as to some place; does then the consideration of the time when the cause of action arises, give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises, determines also the place where it arises; for when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises. I cannot avoid the conclusion that a cause of action arises where that takes place which first makes a cause of action; . . ."

1. The Statutory Liability Arose in Kentucky.

In the instant case the National Bank of Kentucky was physically located in Louisville, Kentucky; its principal place of business was Louisville, Kentucky; and, it provided banking facilities for the State of Kentucky. The business of The Bank was at all times carried on and transacted in Kentucky and the insolvency of The Bank

occurred in Kentucky: "Said Bank was closed by resolution of its Board of Directors on the 16th day of November, 1930." (Bill of Complaint, R-4a.) A national bank's corporate capacity survives the appointment of a Receiver and ends only when its affairs are settled and assets distributed: *Chemical National Bank v. Hartford Deposit Co.*, 161 U. S. 1 (1895).

National banks are localized in the state in which they are situated by the provisions of the National Bank Act (13 Stat. 99, 12 U. S. C. § 21, et seq.). As set forth in the Bill of Complaint The Bank was a resident of and ". . . *domiciled* at Louisville, Jefferson County, in the Western District of Kentucky" (R-4a). While The Bank was a Federal corporation it was a citizen of Kentucky for the purpose of diversity of citizenship: *Pufahl v. Parks, supra;* 36 Stat. 1092, 28 U. S. C. § 41 (16). The Bank was subject to suit only in the Western District of Kentucky: *Leonardi v. Chase National Bank*, 81 F. (2d) 19 (C. C. A. 2nd, 1936), *cert. den.* 298 U. S. 677; 13 Stat. 108 and 18 Stat. 320, 12 U. S. C. § 94. Many other important requirements and privileges of national banks are determined by the city and state of domicile, viz.: place of business (24 Stat. 18, 12 U. S. C. § 30); residence of directors (33 Stat. 818, 12 U. S. C. § 72); consolidation and merger (49 Stat. 718, 12 U. S. C. §§ 33, 34a); branch offices (44 Stat. 1228, 12 U. S. C. § 36); capital and surplus requirements (31 Stat. 48, 12 U. S. C. § 51); and, shareholder records (13 Stat. 111, 12 U. S. C. § 62).

The office of A. M. Anderson, Receiver of The Bank, is located at 420 West Jefferson Street, Louisville, Kentucky. The Comptroller of Currency, Treasury Department, Washington, D. C., authorized and directed the Receiver to collect the 100% assessment levied by him. Pursuant to the authorization the Receiver notified Banco shareholders that he planned to collect the assessment from them. He also sent letters to all shareholders of Banco directing said shareholders to make payment at his office.

The shareholders' statutory obligation was to pay the 100% assessment to the Receiver at his office—420 Jefferson Street, Louisville, Kentucky. The Receiver recognized this fact and "acting pursuant to the authority and direction of the Comptroller of the Currency . . . sent and served upon each of the defendants and all other shareholders of the Banco Kentucky Company" an assessment notice "payable at the Office of the Receiver on or before April 1, 1931." (Bill of Complaint, R-17a.) Under the pleading in this case the allegation of the Receiver must be taken as true. Apart from that, it is in fact true. It is the same obligation imposed by the law. There was no place other than Louisville, Kentucky, at which tender or payment could have been made. The Receiver did not, and could not be expected to maintain offices or agents in each of the forty-eight states. Tender by the defendant at his home—Dimock, Susquehanna County, Pennsylvania—certainly would not have satisfied his statutory obligation.

The contention of the Receiver that the cause of action arose in the United States of America and not in any state presupposes that the whole does not include its parts.

The opinion of the Circuit Court states:

> "We think, therefore, that this is not the kind of cause of action which is properly described as arising within the State of Kentucky. It did not arise there any more than it did in any other one of the states of the United States." *Anderson v. Andrews*, 156 F. (2d) 972 at 975 (C. C. A. 3rd, 1946).

This opinion ignores the fact that legally and geographically the United States is a federal union of the states and not a separate geographical entity where a cause of action can arise: see *Texas v. White*, 74 U. S. (7 Wall) 700 (1868). Under the theory of the Circuit Court a cause of action based upon a single statutory liability and a single factual situation either (1) must arise in each of the forty-eight states in which a shareholder who did not pay the assessment resides, or (2) it does not arise in any state

of the United States. We believe this theory is erroneous. Geographically such a cause of action, if it arises in the continental United States, must of necessity arise in one of the states of the United States or the District of Columbia. Any contention that the cause of action arises in more than one state must be based on the theory that it arises at the residence of the defendant. But the basis of jurisdiction over the defendant does not fix the location of the cause of action:

> "The parties were at all times nonresidents of Kansas. Did the causes of action arise in that state or elsewhere? The claim is that, being transitory, they arose wherever the defendants could have been sued, and that they did not arise in Kansas because the defendants were nonresidents and out of the state. . . .
> "The place where a cause of action arises is not determined by inquiring where it may be enforced. *The two things are not the same.* The right of action must arise, come into being, before it can be enforced anywhere, and when it has arisen the action for its enforcement, unless purely local, may be maintained in any state." [Judge (later Justice) Van Devanter in *Anglo-American Land, M. & A. Co., v. Lombard,* 132 Fed. 721 at pp. 749, 750 (C. C. A. 8th, 1904); Italics added.]

A cause of action arises *when* a prohibited act is committed or a required act is omitted and it arises *at the place* where the prohibited act is performed or the required act should have been performed: *Baltimore & O. R. Co. v. Reed,* 223 Fed. 689 (C. C. A. 6th, 1915) (an action for personal injuries); *Pond Creek Mill & Elevator Co. v. Clark,* 270 Fed. 482 (C. C. A. 7th, 1920) (an action for breach of contract); *Augláize Box Board Co. v. Kansas City Fiber Box Co.,* 35 F. (2d) 822 (C. C. A. 6th, 1929), *cert. den.* 281 U. S. 730 (an action on a contract).

The place where a cause of action upon a liability created by a federal statute arises is the state where the

operative facts occurred which converted the statutory liability into an enforceable obligation: *Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1 (C. C. A. 3rd, 1917) (action under the Sherman Act); *Hansen Packing Co. v. Swift & Co.*, 27 F. Supp. 364 (D. C. N. Y., 1939) (action under Federal Anti-Trust Laws); *Smith v. Continental Oil Co.*, 59 F. Supp. 91 (D. C. N. Y., 1945) (action under Fair Labor Standards Act of 1938).

The present cause of action arose in Kentucky *where* (1) the entire business of the bank was conducted, (2) the insolvency of the bank occurred, (3) the shareholders were obligated to pay the statutory assessment and (4) the breach of the statutory duty occurred.

2. Kentucky Was the Place of Performance.

For the purposes of this case it is immaterial whether the liability is considered purely statutory or contractual in nature. Under either theory the place of performance was Louisville, Kentucky, and the cause of action arose there.

The District Court held that the liability, while statutory in origin, is contractual in nature. This accords with the following decisions of this Court:

Brown v. O'Keefe, 300 U. S. 598 (1937).

"Even so, the liability created though it is by statute, is quasi-contractual in its origin and basis. . . . It is an incident affixed by law to the contract of membership between shareholder and bank. . . . A liability upon quasi-contract is one upon an 'implied contract', and so provable in bankruptcy . . . if the other conditions of allowance are found to be fulfilled" (pp. 606-607).

Chisholm v. Gilmer, 299 U. S. 99 (1936).

"It (remedy by notice of motion) is here sought to be applied, not in equity or admiralty . . . but in a common law cause, a quasi-contractual obligation being the source of liability" (p. 102, parenthesis added).

Bernheimer v. Converse, 206 U. S. 516 (1907).

"It may be regarded as settled that upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature and, as such, capable of being enforced in the courts not only of that State, but of another State and of the United States . . . although the obligation is not entirely contractual and springs primarily from the law creating the obligation" (p. 529).

Platt v. Wilmot, 193 U. S. 602 (1904).

"In the *Whitman* case it was held that this liability, though statutory in origin, was contractual in its nature; or, in other words, the stockholder when he subscribed for or purchased his stock entered into a contract authorized by statute. . . .

". . . the contract being that the holder of the stock shall be liable in accordance with the terms of the statute.

"Also, while the liability is contractual in its nature, it arises out of the Constitution or the statute, or from a combination of both, by virtue of the application of general principles of law to the facts in the case. Neither the Constitution nor the statute says that the liability is contractual, but, as the Constitution and statute existed, the liability arising therefrom, as against the stockholder, is because of the principle of law which works out a contractual liability upon these facts and it may be fitly described as the common law" (pp. 612-613).

The Circuit Court of Appeals rejected this view of the nature of the liability. In the case of *Anderson v. Helmers, et al.*, No. 656, October Term, 1946, to be argued with this case, the Circuit Court of Appeals for the Sixth Circuit adopted the theory that the liability was statutory. Under either theory (1) the place of performance of the share-

holders' obligation was Louisville, Kentucky, (2) the breach of duty (failure to pay the assessment) which created the cause of action occurred in the State of Kentucky, and (3) the cause of action is barred by the statute of limitations of Kentucky where it arose, and therefore (4) under the Act of June 26, 1895, it is barred in Pennsylvania, the forum in the instant case.

3. The District of Columbia.

In the instant proceeding the opinion of the Circuit Court of Appeals seems to suggest that the cause of action arose in the District of Columbia:

> "Nor are we satisfied that when the Receiver named his office as the place where checks could be sent to pay the assessment that made the office the 'place of performance.' The recipient of the payment was really not the Receiver but the Comptroller General of the United States who, obviously, is not located in Kentucky." *Anderson v. Andrews*, 156 F. (2d) 972 at 974 (C. C. A. 3rd, 1946).

It is submitted that the location of the offices of the Comptroller General and of the United States Treasury in the District of Columbia is not sufficient basis for holding that the present cause of action arose in the District of Columbia. However, even if the suggestion of the Circuit Court is correct the present proceeding would nonetheless be barred by the law of Pennsylvania.

The Acts of Congress (Act of March 3, 1901, 31 Stat. 1389, Chap. 854, § 1265; Act of June 30, 1902, 32 Stat. 542, Chap. 1329) embodied in the District of Columbia Code (1940 ed., Section 12-201) provide for limitation of actions in the District of Columbia as follows:

> "No action shall be brought . . . upon any simple contract, express or implied . . . after three years from the time when the right to maintain any such

action shall have accrued; nor for any statutory penalty or forfeiture . . . after one year from the time when the right to maintain any such action shall have accrued; and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued. . . ."

If the present cause of action arose in the District of Columbia and is statutory in nature the time within which the Receiver was required to bring this action under the law of Pennsylvania was within one year after April 1, 1931 by virtue of the Pennsylvania Act of June 26, 1895, or, if the cause of action is on an implied contract, then within three years after April 1, 1931.

If it should be contended that the District of Columbia is not a "state" within the meaning of the Pennsylvania Act of June 26, 1895, we submit that the word "state" is used in that Act in its broadest significance as meaning a political subdivision of a federal government. It includes not only the states of the United States which were in existence at the time of the passage of the Act, but territories which have since become states such as Arizona, Oklahoma, New Mexico and Utah. It also includes the District of Columbia. The obvious intent of the "borrowing act" is that if the action would be barred at the place where it arose it is also barred in Pennsylvania.

Congress in adopting national legislation treats the District of Columbia as if it were a state, e. g., the Federal Communications Act of 1934 [48 Stat. 1064 et seq., 47 U. S. C. § 153 (e)]; see *Sablowsky v. United States*, 101 F. (2d) 183 (C. C. A. 3rd, 1938).

In the case of *Talbott v. Silver Bow County*, 139 U. S. 438 (1891), Mr. Justice Brewer, speaking for this Court, said:

"Still further, while the word State is often used in contra-distinction to Territory, yet in its general pub-

lic sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. Such a use of the word 'State' has been recognized in the decisions of this court. • • •

"On the face of the language, *the word* 'state' would seem to refer, not to political communities in general, but to those particular communities which form the States of the Union; yet it was held to include the District of Columbia, this court, by Mr. Justice Field, observing: 'This article is not happily drawn. It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as States though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law., c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States'" (pp. 444-5).

The District of Columbia law provides for a one year limitation for a statutory penalty or forfeiture and for a three year limitation (a) upon an action upon any simple contract, express or implied, and (b) upon all other actions when the limitation is not otherwise especially prescribed.

The shareholders' liability, whether statutory or contractual, would therefore be barred if the cause of action arose in the District of Columbia.

E. The Circuit Court of Appeals Did Not Apply the Law of the Forum.

The opinion of the Circuit Court of Appeals in the instant case did not apply the Pennsylvania Act of June 26, 1895, the applicable limitation law of the forum, and gave the following as a reason for not doing so:

> "There is a wider ground, however, on which we think the defendants are wrong and which compels a reversal of the judgment of the District Court. The approach, we think, is found in the language of Mr. Justice Frankfurther speaking for the Court in Holmberg, et al. v. Armbrecht, et al., U. S. , decided February 25, 1946. In the case which involved liability of shareholders in the Southern Minnesota Joint Stock Land Bank he said: '*We do not have the duty of a federal court, sitting as it were as a court of State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress.*' In our case the liability imposed upon the shareholders of national banks for the benefits of their creditors is not a state created right, but one created by United States statute. The liability extends to all shareholders regardless of the state where the bank has its principal place of business and regardless of where shareholders live. In dealing with it the rules applicable are not those in which a federal court, sitting in a diversity case, applies state law as accurately as it can. It is, rather, one of those instances where federal courts are enforc-

ing rights arising out of transactions governed by the federal government acting within its constitutional field." *Anderson v. Andrews, supra*, at page 975 (Italics added).

It is submitted that the statements of the court quoted above would mean that no state statute of limitations is applicable. However, the rule in such cases is firmly established that the law of the forum governs so far as the limitation of actions is concerned: *Fisher v. Whiton, supra; Rawlings v. Ray, supra; Pufahl v. Parks, supra.*

The Circuit Court of Appeals based this new approach to the instant case primarily on two sentences, which are italicized in the above quotation, from the decision of this Court in the case of *Holmberg, et al. v. Armbrecht, et al.*, 327 U. S. 392 (1946). It is submitted that the Circuit Court erred in applying the rule of that case because it falls in an entirely different category from the case at bar. We have no criticism of that decision or of the quoted language of Mr. Justice Frankfurther in its setting, but when the two cases are analyzed it is clear that this language is not applicable to the present case. The *Holmberg* case was a *suit in equity by creditors* of a joint stock land bank against its stockholders to enforce their liability. A New York stockholder had fraudulently concealed his ownership under the name of Armbrecht. This was not discovered till 1942. Suit was brought in 1943. The defenses were (1) the New York statute of limitations of ten years and (2) laches. This Court had previously held in *Russell v. Todd*, 309 U. S. 280 (1940), that the New York three year statute of limitation did not bar such a suit because, unlike a receiver's suit, the *sole* remedy in a creditor's suit is in equity and the state statute would not bar it if brought in a state court. The *Holmberg* decision therefore fell within the rule that where the sole remedy is in equity Federal Courts are not bound to adopt state statutes of limitation applicable only to actions at law.

Mr. Justice Frankfurter was at pains to point out that the *Holmberg* case was one where the sole remedy is in equity. In the sentence immediately preceding that quoted by the Circuit Court, he states:

> "The present case concerns not only a federally-created right but *a federal right for which the sole remedy is in equity*" (p. 395, italics added).

The entire opinion of Mr. Justice Frankfurther is bottomed on this fact. In contrast, the present case is one in which there is concurrent jurisdiction in both law and equity and which falls within the rule that the statute of limitations that bars the legal right also bars recovery in a suit in equity.

The distinction between a creditor's suit in equity against stockholders of a joint stock land bank and a receiver's suit against stockholders of a national bank is clearly set forth by former Chief Justice Stone in *Russell v. Todd, supra.* The limitation rules applicable to these two classes of suit are entirely different: see *Russell v. Todd, supra; Rawlings v. Ray, supra.* We respectfully submit, therefore, that the *Holmberg opinion,* when read in its entirety, affords no support for the decision of the Circuit Court.

CONCLUSION.

It was the statutory obligation of the shareholders to pay the assessment to the Receiver at his office in Kentucky. The failure to make this payment to the Receiver in Kentucky gave rise to the present cause of action. The cause of action arose in Kentucky on April 1, 1931. It was barred by the Kentucky five year statute of limitations on April 1, 1936. The present action was started more than ten months thereafter and is barred by the Pennsylvania Act of June 26, 1895.

The present action is an attempt by the Receiver to enforce a stale claim on what has been admitted to be a "harsh" liability. In addition, the double liability of shareholders of national banks has since been removed

(Acts of June 16, 1933, c. 89, § 22, 48 Stat. 189 and Aug. 23, 1935, c. 614, § 304, 49 Stat. 708; 12 U. S. C. § 64a).

The present action has long delayed the settlement of many estates. As stated recently by this Court in other litigation brought by this Receiver, involving his attempt to substitute parties after the two year limitation imposed by Rule 25 (a) of the Rules of Civil Procedure:

> "The normal policy of a statute of limitations is to close the door—finally, not qualifiedly or conditionally. The federal law embodied in Rule 25 (a) has a direct impact on the probate of estates in the state courts. It should not be construed to be more disruptive of prompt and orderly probate administration in those courts than its language makes necessary." *Anderson v. Yungkau,* U. S. , 15 U. S. Law Week 4150 (1947).

In such a situation the statute of limitations should be strictly enforced:

> "The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation, after the lapse of a reasonable time. It has been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest." *Guaranty Trust Co. of New York v. United States,* 304 U. S. 126 (1938).

The judgment of the Circuit Courts of Appeals should therefore be reversed.

Respectfully submitted,

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